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IN THE

Supreme Court of the United States

No. 271

CHARLOTTE WILD, Administratrix of the Estate of John Wild, Deceased,

Petitioner

vs.

ATLANTIC REFINING COMPANY,
Defendant and Third Party Plaintiff,

Respondent

vs.

CAMDEN PAINTING COMPANY,
Third Party Defendant

Answer to Petition for Certiorari to the United States Circuit Court of Appeals for the Third Circuit and Brief in Support Thereof

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ANSWER TO PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Atlantic Refining Company, by its attorneys, answer the petition of Charlotte Wild, Administratrix of the Estate of John Wild, for a writ of certiorari in the above case and pray that certiorari be denied for the reason that the petition was not timely filed within the provisions of the applicable law, and for the other reasons hereinafter more fully stated.

COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Where a trial judge denies or reserves decision on defendant's motion for a directed verdict, and, after the jury has returned a verdict for plaintiff, defendant files a motion for judgment n. o. v. as provided for in Rule 50(b), does the entry of judgment for defendant n. o. v., for the reason that no breach of duty had been proved, violate the right to a jury trial provided for in the Seventh Amendment?

2. Does the law of Pennsylvania require a landowner to have an expert inspection made of a roof to ascertain alleged deterioration admittedly not observable except by an expert roofer before permitting a person to work on the roof?

COUNTER PRELIMINARY STATEMENT

The Court of Appeals for the Third Circuit did not "refuse to consider" the question of whether the granting of judgment for defendant n. o. v. constituted a denial of the right of trial by jury under the Seventh Amendment. In fact, the Court had the petition for rehearing before it, together with the answer thereto, both of which contained the legal arguments presented by the parties. In denying the petition for rehearing the Court actually had every opportunity to consider the legal arguments relevant. It must be assumed that it did so, and concluded that the petitioner's constitutional guarantees had been safeguarded.

Johnson v. New York, N. H. & H. R. Co., 194 F.(2d) 194 (C. A. 2nd, 1952), does not raise the same constitutional issue which petitioner contends is raised here. This is more specifically set forth in the argument, infra.

The issue in this case is not that of "slavish adherence" to anything. The sole issue is one of legal duty, and the obligation to respond in damages if a legal duty has been breached. In this case the trial judge decided that defendant was not liable because no duty was breached which would support a finding by the jury against defendant. The Court of Appeals sustained that conclusion made by the trial judge. The substantial basis for the propriety of these decisions is set forth in the argument, infra.

COUNTER STATEMENT OF THE CASE

Camden Painting Co., a corporation, entered into a written contract with defendant on June 6, 1946, (Appellee's Appendix, p. (a6)) to do specified painting on boiler house No. 17 at defendant's refinery in Philadelphia. In pursuance to the contract, plaintiff's decedent as foreman (202a) and another employee went upon defendant's premises to perform the work contracted for. The employees used various appliances, chiefly a scaffold consisting of hooks, tackle, blocks and a platform all belonging to the the contractor. The contract required the contractor to furnish all facilities for the performance of the work. The contractee did not undertake to provide any.

In the course of their work in applying a first coat of paint, the two painting employees went on a slanting roof atop the boiler house to place hooks over a wall or parapet extending above the roof from which hooks the scaffold on which the men worked was suspended. The roof surface consisted of a corrugated roofing material made of cement and asbestos. It is a standard product made by several manufacturers and is largely used on industrial structures such as the boiler house in question. The roofing material was placed over steel beams, two feet eight inches apart at the place here in question, and was attached to the beams by means of steel bolts the heads of which were visible on the roof surface and marked the location of the beams (205a). According to uncontradicted testimony, a superintendent of the contractor and decedent made a preliminary inspection of the boiler house (338a) and both then stated their agreement that in going upon the roof care should be taken to stand upon the beam lines (341a). De-

cedent as foreman gave a like warning to his fellow employee (203a-205a). Appellee's Appendix (a1).

It becoming necessary to remove the scaffold hooks from the wall a second time, decedent on November 12, 1946, undertook to do it alone and went to the roof. So far as the testimony disclosed he was not seen by anyone on or in the near vicinity of the roof (196a). His body was found on the floor of the boiler house. He had apparently came thru the roof as evidenced by a rectangular hole therein between two of the beams. At the place where decedent fell there was an open shaft with no obstruction between the roof and the floor. Defendant admitted in response to requests for admissions, that decedent met his death by falling thru the hole in the roof. Where with relation to the location of the holes, the decedent had been, what were his activities immediately prior to the accident, or what were the circumstances which led up to it was not stated by any one at the trial.

Plaintiff, the widow of the decedent, brought this action against defendant under the Pennsylvania death statute, in her own and her minor children's behalf and under the survival statute in behalf of decedent's estate for damages, alleging various acts of negligence including a failure to warn. Defendant brought in Camden Painting as a third party defendant, alleging inter alia that primarily the employer owed the decedent the duty of providing a safe place in which to work and also relying upon an indemnity or exoneration clause in the contract between defendant and third party defendant. During the trial defendant entered a voluntary dismissal as to Camden Painting.

At the trial, plaintiff's proof as to defendant's liability consisted entirely of the testimony of a roofing expert who had examined defendant's premises, particularly the roof, several years after the accident and after extensive repairs had been made to the roof. He testified that the roofing material, the method of attachment and construction were all proper and according to accepted standards with an additional safety factor as to the two feet eight inches span between supporting beams, the customary span in like construction being four and a half feet. The expert witness testified that this type of roofing material had a tendency to become stronger with the passage of time, that it lasted indefinitely (116a, 121a), but that in this instance it was his opinion that the roofing had "deteriorated." He was not able to state definitely the cause of the deterioration, or in what manner it had deteriorated or how or to what extent the deterioration effected the strength or the weight bearing qualities of the roof. He admitted his lack of qualification to testify regarding heat or fumes or gas usually present at a refinery as possible causes for deterioration (128a, 133a).

At the conclusion of plaintiff's case, defendant submitted a motion for dismissal upon the ground that plaintiff had failed to submit sufficient evidence to entitle her to relief (183a). The motion was reserved by the learned trial judge (187a).

Defendant's evidence, including the testimony of Camden's superintendent and of decedent's fellow workman, established the agreement, understanding and instructions above referred to respecting the necessity for standing upon the beam lines in going upon the roof. Defendant sub-

mitted testimony as to the nature of the roofing material, its suitability and frequent use for the purpose here in question and of the custom among those in various branches of the building trade to use chicken ladders, planks or similar appliances in going upon a roof of this type. An employee of the defendant who was the first person to go to the roof following the accident testified that he found the hook with the block and ropes attached to it hanging loose over the hole in the roof. Using a planking, he hung the hook on the wall (173a, 176a).

Nowhere in the record is it admitted, as appears at page 4 of the petition, that the roof "collapsed due to defective condition." Neither did defendant know "the decedent would be required to walk . . . upon that particular portion of the roof which gave way" (p. 5). Nor is it a fact that defendant acted as an expert (p. 5). Nor does the record show any curling "at the point of the accident" (p. 5).

At the conclusion of all the testimony, defendant submitted a motion for a directed verdict. The motion was denied and the case was submitted to the jury with written interrogatories.

The jury answered the interrogatories as to liability favorable to the plaintiff and rendered a verdict for $45,000. Defendant filed a motion for judgment n. o. v. or in the alternative, for a new trial. The District Court entered judgment n. o. v. for defendant and plaintiff appealed.

ARGUMENT

1. GRANTING A JUDGMENT N. O. V. PURSUANT TO RULE 50(B) IS A PROPER PROCEDURE AND DOES NOT VIOLATE THE SEVENTH AMENDMENT.

Petitioner has raised the question of the constitutionality of Rule 50(b). However, it is not true that exactly the same issue is involved in *Johnson v. New York, N. H. & H. R. Co.*, 194 F.(2d) 194 (C. A. 2nd, 1952), in which case certiorari has been granted.

In the instant case the exact procedure provided for in Rule 50(b) was followed. It apparently was not followed in the *Johnson* case. It appears at page 195:

> ". . . These questions were raised below by a motion for a directed verdict which the court reserved and denied with an opinion after the jury's verdict."

The opinion concludes, at page 197:

> ". . . In our opinion the motion for a directed verdict should have been granted. Accordingly the judgment is reversed."

So, in the *Johnson* case no motion for judgment n. o. v. or in the alternative for a new trial was filed. Those motions were filed in the case at bar.

United States Law Week reports the contention in the *Johnson* case to be that ". . . (3) court of appeals erred in failing to order new trial under Rule 50(b) of F. R. C. P. in contravention of Supreme Court's interpretation." (20 L. W. 3303).

It is later reported (20 L. W. 3327): "Certiorari granted limited to issue raised as to application of Rule 50(b) of Rules of Civil Procedure."

It is obvious from these reports that the *Johnson* case does not raise the constitutional issue urged by petitioner in this case, and certiorari was not in fact granted in a case parallel with this case.

The constitutionality of the procedure provided for in Rule 50(b) has long been established, and sufficiently often reëxamined and sustained that attack in this case cannot budge this established precedent.

Petitioner's argument presents no difficulty. Whatever confusion may have resulted from the opinion of the late Mr. Justice Van Devanter in *Slocum v. New York Life Ins. Co.*, 228 U. S. 364, 33 S. Ct. 523, 57 L. Ed. 879 (1912) has since been dispelled. In that case, where a motion for a directed verdict was refused by the trial court, a divided Supreme Court held that a new trial was proper and that judgment n. o. v. could not be entered. A vigorous dissent was written by the late Chief Justice Hughes, to the effect that a directed verdict could be entered properly. Incidentally the *Slocum* case originated in the Third Circuit.

For 23 years the question of whether a Federal appellate court could direct a verdict was answered to the contrary, upon the authority of the *Slocum* case: *Union Pac. R. Co. v. United States*, 219 Fed. 427, at 437 (1915), where judgment was reversed and a new trial ordered. See also *Glynn v. Krippner*, 60 F.(2d) 406 (C. C. A., 8th, 1932), at pages 409, 410, where the Circuit Court concurred with the trial judge's opinion that the *Slocum* case was erroneous.

The matter was finally laid to rest in *Baltimore & Carolina Line, Inc., v. Redman*, 295 U. S. 654, 55 S. Ct.

890, 79 L. Ed. 1636 (1935), when the late Mr. Justice Van Devanter himself emasculated the *Slocum* case by limiting it procedurally to its facts, and held that, if the trial judge *reserves decision* upon the motion for a directed verdict, then the appellate court may properly enter judgment n. o. v. The limitation was in fact a reversal.

In the case at bar a motion was made at the close of petitioner's case for dismissal and direction of a verdict for respondent and decision thereon was reserved (183a, 187a).

The opinion in the *Redman* case points out (295 U. S. at page 660) that this practice of reserving a decision was a part of the common law and well established prior to the Seventh Amendment.

In *Montgomery Ward & Co. v. Duncan*, 311 U. S. 243, 61 S. Ct. 189, 85 L. Ed. 147, former Mr. Justice Roberts stated as a preamble to his opinion: "In this case we are called upon to determine the appropriate procedure under Rule 50(b) of the Federal Rules of Civil Procedure."

The procedural steps in the trial of the *Duncan* case were identical with those in the case at bar. Judgment n. o. v. was there entered for defendant by the trial judge, but there was no decision upon the motion for a new trial. In the Court of Appeals, the judgment n. o. v. was reversed, and the question of granting a new trial was at issue in the Supreme Court. In allowing the new trial, it was stated concerning Rule 50(b) (311 U. S. at page 250):

> "The rule was adopted for the purpose of speeding litigation and preventing unnecessary re-trials. It does not alter the right of either party to have a question of law reserved upon the decision of which the court

might enter judgment for one party in spite of a verdict in favor of the other (citing *Slocum* and *Redman* cases, supra). Prior to the adoption of the rule, in order to accomplish this it was necessary for the court to reserve the question of law raised by a motion to direct a verdict (citing *Redman* case, supra). The practice was an incident of jury trial at the time of the adoption of the Seventh Amendment to the Constitution.

"Rule 50(b) merely renders unnecessary a request for reservation of the question of law or a formal reservation; and, in addition, regulates the time and manner of moving for direction and of moving for judgment on the basis of the refusal to direct. It adds nothing of substance to rights of litigants heretofore existing and available through a more cumbersome procedure."

The foregoing statement by Mr. Justice Roberts sustains in an eloquent manner the constitutionality of the procedure in Rule 50(b) which was followed in the instant case.

Berry v. United States, 312 U. S. 450, cited in the petition at page 7, as well as *Conway v. O'Brien*, 312 U. S. 492, were cases in which no motion for judgment n. o. v. were filed. In both cases the Supreme Court said it was not necessary to decide the propriety of the procedure. The same situation existed in the *Johnson* case, supra, which petitioner argues is the same as the case at bar, but which it has been shown is not. That problem was specifically at issue in *Cone v. West Virginia Paper Co.*, 330 U. S. 212, and adverted to in *Globe Liquor Co. v. San Roman*, 332 U. S. 571.

The *Johnson* case, supra, falls within the line of cases mentioned immediately above. The instant case, wherein the proper steps set out in Rule 50(b) were followed, is in no way like it. The *Johnson* case, supra, raises only the issue of propriety of procedure, not the total question of unconstitutionality.

To argue that Rule 50(b) violates the Seventh Amendment comes after a long line of cases in which its constitutionality has been directly or indirectly in issue and not once has the court indicated or inferred that there was any question that it is constitutional. Particularly significant is the *Duncan* case, supra.

The Seventh Amendment has two important provisions: (a) "no fact tried by a jury shall be otherwise reexamined . . ." except (b) "according to the rules of the common law."

In the case at bar there was no retrial of facts. The Courts took the facts and held that *under law* there could be no liability based thereon. The procedure by which that conclusion was reached in the instant case was the same as that which existed at common law before the adoption of the Amendment. Since neither of these provisions were violated, there could not be any breach of the Amendment.

It is submitted that upon the basis of the foregoing argument it is clear the procedure followed in this case, set forth in Rule 50(b), in no way violates the right of a jury trial provided for in the Seventh Amendment. Certiorari should then be denied.

Petitioner's second and third arguments (p. 11 to 19) are substantially rebutted by the foregoing argument in support of the constitutionality of Rule 50(b).

Whether a verdict should be directed cannot be a procedural question only, for, as here, where it is related to the basic problem of whether a legal duty has been breached by commission or omission that certainly is determined by the *substantive* legal question of whether any duty existed.

In the case at bar there was no direct evidence as to how decedent met his fate. All of the evidence was circumstantial, even the opinion testimony given from observing photographs. Where, as in the instant case, the plaintiff relies wholly upon circumstantial evidence in seeking to prove that the defendant was negligent, the Federal court applies the law of the state wherein the accident occurred. *Sierocinski v. E. I. du Pont de Nemours & Co.*, 118 F.(2d) 531 (C. C. A. 3rd, 1941); *Sweeney v. Bonacci*, 173 F.(2d) 541 (C. C. A. 3rd, 1949). This question, squarely at issue in the present case, was before this Court in *Nash v. Ruan*, 149 F.(2d) 885 (C. C. A. 3rd, 1945) (cert. den., 326 U. S. 758, 66 S. Ct. 99, 90 L. Ed. 455). In the *Nash* case, at page 887, the Circuit Court phrased the question thusly: "*The principal question . . . is whether the evidence . . . was sufficient, under Pennsylvania law, to permit the jury to find that the defendant was negligent.*" (Italics supplied.)

In that case, the Court, at page 888, stated further:

> "The circumstantial evidence presented in the present case is as consistent with the theory that the defendant was not negligent as it is with the theory he was. *If the plaintiff cannot show the possibility of a conclusion of defendant's negligence supported by a clear preponderance of its likelihood*, Ott v. Boggs, 219 Pa. 614, 69 A. 61, *and excluding other probabilities just as reasonable*, Alexander v. Pennsylvania Water

Co., 201 Pa. 252, 50 A. 991, *the plaintiff should not be permitted to go to the jury. The circumstances must compel the conclusion that the defendant was negligent.* Pfendler v. Speer, 323 Pa. 443, 185 A. 618. *The jury may not be permitted to guess.*" (Italics supplied.)

The Supreme Court of Pennsylvania recently restated the law of the state governing the proof of defendant's negligence by circumstantial evidence in *Ebersole v. Beistline*, 368 Pa. 12, 82 A. (2d) 11 (1951), where Mr. Justice Horace Stern stated at page 17:

> "Proof of negligence may be furnished by the circumstances themselves and it is not essential to have eye-witness testimony, but *where the circumstantial evidence is offered because direct proof is not available it must provide as the only reasonable inference the conclusion that the accident was caused by the negligence of the defendant.*" (Italics supplied.)

In support of this proposition the Court cited *Pfendler v. Speer*, 323 Pa. 443, 445, 185 Atl. 618, 619; *Brooks v. Morgan*, 331 Pa. 235, 239, 200 Atl. 81, 83; *Wenhold v. O'Dea*, 338 Pa. 33, 36, 12 A.(2d) 115, 117; *Skrutski v. Cochran*, 341 Pa. 289, 291, 19 A. (2d) 106, 107; *Rowles v. Evanuik*, 350 Pa. 64, 68, 38 A.(2d) 255, 257; *Van Tine v. Cornelius, Admr.*, 355 Pa. 584, 586, 50 A.(2d) 299, 300; *Donaldson, Executrix, v. Pittsburgh Rwys. Co.*, 358 Pa. 33, 37, 55 A.(2d) 759, 761.

Particularly pertinent is *Doerr v. Rand*, 340 Pa. 183, 16 A.(2d) 377, a case cited by petitioner in the Court of Appeals, in which plaintiff was injured by a piece of glass falling onto the sidewalk in front of a drug store. The court said, at pages 185, 186:

"Confronted by an impressive line of authorities holding that the doctrine of res ipsa loquitur does not apply to a case such as this (citing cases) *plaintiffs realized* at the trial that *it was incumbent upon them to produce some evidence* of facts or circumstances *from which negligence* on the part of defendant *might* properly *be inferred. This burden they sought to meet by producing* as *an expert witness* a civil engineer who testified that safe construction required that the glass be supported by steel angles or hooks anchored into the wall, and that it be calked around the edges in order to prevent the penetration of moisture. *This witness had never examined the premises, but, by looking at a small and apparently none too clear picture of the store-front taken some three weeks after the accident, he ventured the observation that no supporting angles had been used. . . . At best, the testimony of plaintiffs' expert was based upon dubious facts assumed from the reading of an unsatisfactory photograph, and, it being the only evidence offered to establish negligence, the court below was fairly justified in holding it insufficient for the purpose.*" (Italics supplied.)

The basic issue in this case is not only one of the manner of proof, however. More fundamentally it is one as to whether, regardless of the manner of proof, there has been a breach of a legal duty. In the case at bar the District Court and the Court of Appeals both credited the testimony in the light most favorable to petitioner. Both courts then decided that even so viewing the testimony, neither court could find that any duty had been breached and therefore there could be no liability.

Petitioner's third argument (pp. 17 to 19) states in effect that the question of negligence is always a question of fact, and only a jury can decide it. Such fantastic argument challenges the established common law procedure of granting new trials, directing verdicts and granting judgments n. o. v. These procedures are too well established to be challenged seriously.

However, to the contrary of petitioner's argument, it is well established that a duty of care, or negligence, may be established by judicial decision: *Restatement of Torts*, §285. It would be incongruous if that common law principle could not be sustained by the courts which originated it. Since the Seventh Amendment permits retrial of "legal" questions in accordance with existing common law procedures, petitioner and respondent both received in this case their constitutionally guaranteed rights.

2. PENNSYLVANIA LAW DOES NOT REQUIRE EXPERT INSPECTION OF A ROOF BY A LANDOWNER.

It is conceded that the respondent's duty is controlled by Section 343 of the *Restatement of Torts* and the case law consistent therewith.

Both the trial judge and the Court of Appeals took the same view of the applicable law. As it is stated in the opinion of Court of Appeals Judge Goodrich, an eminent authority in this field:

> "The district court following the cases which apply the Restatement in Pennsylvania differentiated the duty to inspect a roof to make sure it was in reasonable condition and the effort required for such a thing as a floor or stairway in a store where people are invited and expected to appear in large numbers."

Specifically, as to the duty of care with respect to a roof it was stated in *Lentz v. Allentown Bobbin Works*, 291 Pa. 526, 140 A. 541 (1928) (at page 529):

> "But the fact that defendant had not inspected the roof is urged. No one is required to do a vain thing or to make a useless inspection. . . . (The property owner) is only required to use ordinary care to protect those lawfully upon his premises. . . . *This degree of care does not place upon the property owner the practically impossible task of testing every roof board.*" (Italics supplied.)

This was reiterated by Mr. Justice Chidsey in referring to the *Lentz* case in his dissenting opinion in *Miller v. Hickey*, 368 Pa. 317, 81 A.(2d) 910, wherein he stated at page 339: ". . . *a roof ordinarily is not designed to be walked upon. Its examination must necessarily be superficial.*" (Italics supplied.) Mr. Justice Bell, who wrote the majority opinion in the *Miller* case, also quoted the foregoing portion of the *Lentz* case, approved the standard adverted to in that case and held it to be controlling.

Concerning the *Lentz* case, Judge Goodrich said:

> "The case (at bar) is more like, but still not just like Lentz v. Allentown Bobbin Works, 291 Pa. 526 (1928), where a defective roof was involved. It is not just like this case because to discover the defect there would have required the removal of the roof."

However, it is abundantly clear that the *Lentz* case does not require the "expert inspection" which petitioner admits would have been necessary in this case. (Petition, p. 5.) The *Lentz* case in turn is buttressed by the recently

decided *Miller* case, supra, wherein the *Lentz* case was reaffirmed and, in the dissenting opinion, it was said that the examination of a roof must be superficial. The Pennsylvania cases in point do not require an expert inspection under the undisputed facts in the case at bar. Therefore, no duty to decedent was violated by failure to have such an inspection made.

In support of the argument that an expert inspection is required petitioner cites *Hardy v. Philadelphia National League Ball Club*, 99 Pa. Superior Ct. 326, at pages 22 and 23 of the petition. Concerning this case, as compared with the case at bar, Judge Goodrich said:

> "But here we have an isolated spot on a roof which is made from material supposed to last indefinitely and to get harder and stronger as it stays. It is not a place which carries the burden of public use. Both the nature of the material and the extent of use by the public completely distinguish this case from that of Hardy v. Philadelphia National League Club, 99 Pa. Sup. 326 (1929) relied on so heavily by plaintiff."

The above cited cases, and particularly the reference in the dissenting opinion in the *Miller* case sustain that as the law in Pennsylvania.

Judge Goodrich also distinguished *McCarthy v. Ference*, 358 Pa. 485, 58 A.(2d) 49, cited by petitioner at page 21, pointing out that the trial judge ". . . also pointed out that cases involving the duty of a landowner to those on adjoining premises or on a public highway are different" from the duty in the case at bar. This is so clear that the citation of the *McCarthy* case as authority in a case such

as this is not understandable. A reading of the *McCarthy* case will demonstrate beyond doubt the differences existing factually and legally. Particularly the extended history of landslides, erection of warning signs, etc., show how these cases, aside from the question of legal duty, are distinguishable factually (see 358 Pa. at pages 491, 492).

Fuller v. Pennsylvania R. R. Co., 169 Pa. Superior Ct. 523, cited by petitioner with the *McCarthy* case, supra, has recently been *overruled:* see 371 Pa. 330. Mr. Justice Chidsey of the Pennsylvania Supreme Court distinguished the *McCarthy* case (371 Pa. at page 340). Study of these opinions will demonstrate clearly that this line of cases has no applicability to the case at bar and that citation of them as authority is meaningless. The applicable line of cases is *Lentz* and *Miller* discussed and cited supra, under which, here, no duty of expert inspection exists.

Newingham v. J. C. Blair Co., 232 Pa. 511, 81 A. 556 (1911), cited by petitioner at page 21, involved a fire escape as did *Miller v. Hickey*, supra. Factually, it is distinguishable from this case because of the differences legally as to the duty to inspect. There a duty to inspect existed. Here, none exists under the law, particularly the expert inspection admittedly necessary to give notice.

Thorp v. Boudwin, 228 Pa. 165, cited by petitioner at page 20 as "on all fours" is so readily distinguishable that its citation is not understood. In the *Thorp* case the building had been *condemned* as unsafe. There is no such evidence here. The sole issue here was whether a duty to warn existed upon the basis of a possible duty to make an expert inspection. There the question was whether the building collapsed because of an affirmative act of overloading.

Kulka v. Nemirovsky, 314 Pa. 134, 170 A. (2d) 261, cited at pages 21 and 22, has no application. In that case a top heavy lathe was allowed to stand without being properly attached. The *Kulka* case is like *Straight v. Goodrich Co.*, 354 Pa. 391, 47 A. (2d) 605, cited by petitioner below. In the *Straight* case a loose radiator was placed adjacent to a wall near an elevator shaft. Both of these situations were in their nature the creation of a trap. In the *Straight* case (at page 394) the court held it to be a "hidden menace." There is no such implication in the case at bar.

Many cases have been examined here, and previously in the District Court and the Court of Appeals. However, after full analysis of all of the authorities, it is clear and obvious that both courts below correctly and properly applied the law of Pennsylvania. There is adequate support for their finding that the law of Pennsylvania does not require an expert inspection under the facts which exist here.

CONCLUSION

There is no reason to grant certiorari. There is every reason for denying it including the fact that the petition was not timely filed. Petitioner's contention that Rule 50(b) is unconstitutional finds no support in any of the cases cited in the petition. Conversely, upon the procedural facts here it has been shown conclusively that the steps here taken have been examined and reëxamined and found to be proper within the protections guaranteed all parties by the Seventh Amendment.

Petitioner's contention that under Pennsylvania law that respondent should have made an expert inspection of

the roof likewise has no legal basis. No case has been cited which requires any conclusion but that already and properly twice held. Respondent has cited all of the relevant cases and distinguished those which petitioner has relied upon.

For these reasons it is respectfully submitted that certiorari should be denied and the respondent so prays.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1952. No. 271.

CHARLOTTE WILD, Administratrix of the Estate of John Wild, Deceased,

Petitioner,

vs.

ATLANTIC REFINING COMPANY,

Defendant and Third Party Plaintiff,

vs.

CAMDEN PAINTING COMPANY,

Third Party Defendant.

PETITION FOR RE-HEARING BY THE FULL COURT ON PETITION FOR EXTENSION OF TIME OF FILING PETITION FOR CERTIORARI AND FOR LEAVE TO DOCKET PETITION FOR CERTIORARI.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Charlotte Wild, Administratrix of the Estate of John Wild, Deceased, by her attorneys, prays that the Court

permit her to docket her petition for certiorari, her original petition for extension of time of filing petition for certiorari and for leave to docket petition for certiorari having been denied by the Honorable Mr. Justice Harold H. Burton in an opinion dated August 22, 1952, and in support of said petition assigns the reasons set forth in the attached memorandum.

QUESTIONS PRESENTED.

1. Did not the Honorable Mr. Justice Burton err in holding that he had not the jurisdiction to consider petitioner's application for an extension of time for filing her petition for writ of certiorari, on the ground that said application had not been received in the Honorable Justice's hands within ninety days of the denial of the petition for reargument by the Court below?

2. If petitioner's request for an extension of time be considered should not the Honorable Justice exercise his discretion to grant the application for an extension of time?

3. Should not the petitioner's petition for a writ of certiorari which arrived at the office of the Clerk of the Supreme Court of the United States on August 14, 1952 be considered as having been timely filed?

MEMORANDUM IN SUPPORT OF PETITION FOR RE-HEARING BY THE FULL COURT ON PETITION FOR EXTENSION OF TIME OF FILING PETITION FOR CERTIORARI AND FOR LEAVE TO DOCKET PETITION FOR CERTIORARI.

I. STATEMENT OF FACTS.

On May 15, 1952, the United States Court of Appeals for the Third Circuit issued its order denying petitioner's motion for re-hearing. The first time the petitioner or anyone acting on her behalf had any actual notice of the decision of said Court of Appeals was on May 16, 1952.

Following this, these steps were taken by the petitioner:

1. On July 28, 1952, the petitioner paid her docket fee necessary to the filing of this petition for certiorari.

2. On July 28, 1952, the petitioner forwarded to the Office of the Clerk of the Supreme Court of the United States ten copies of Appendices for Appellant, Volumes I and II, ten copies of Appellants Petition for Re-Argument, and a copy of the Appendix to Brief for Appellee.

3. On August 1, 1952, petitioner sent to the Office of the Clerk of the Supreme Court of the United States, additional copies of her Petition for Re-Argument and nine copies of Defendant's Answer to Petition for Re-Argument.

At 5:45 P. M. on August 13, 1952, petitioner's attorneys received in their office a telegram from E. P. Cullinan, Assistant Clerk, dated August 13, 1952, 4:05 P. M. The office of the Clerk of the Supreme Court had closed on that day as usual at 4:30 P. M.

The telegram read as follows:

> "Today appears to be last day to docket Wild Case. Wire Advice."

Petitioner's attorneys immediately dispatched to Mrs. E. P. Cullinan at the office of the Clerk of the Supreme Court of the United States the following wire:

> "Please docket Wild case. Copies of petition are on way. Delay unavoidable."

This latter wire was received by the guard on duty at the Supreme Court Building in Washington at 7:30 P. M., on August 13, 1952.

That same night, August 13, 1952, attorneys for the petitioner dispatched to the office of the Clerk of the Supreme Court, the petition for certiorari. These were received at the Supreme Court Building at 9:00 A. M. on August 14, 1952. At the same time, 9:00 A. M., August 14, 1952, the printed appendices were received at the office of the attorneys for the petitioner from the Clerk of the Supreme Court.

On August 15, 1952, counsel filed with the Court the petition for leave to docket petition for certiorari. According to Mr. Justice Burton's opinion, the wire received at the Court on August 13, 1952, within the ninety day period, was forwarded to him at Murray Bay.

II. ARGUMENT.

A. Mr. Justice Burton had jurisdiction to rule on the application for extension of time.

Mr. Justice Burton denied petitioner's request for an extension. He treated the telegram as a request pursuant

to 62 Stat. 961, 28 U. S. C. A. Sec. 2101(c), and as having been made on August 13, or within the ninety days.

> "The wire does not in terms request an extension of time. However it may conceivably be treated as such a request in the light of the fact that on August 13th such a request, if made to Justice of the Court, would have been timely."

The Justice held, however, that since the telegram which arrived at the United States Supreme Court on the 13th within the ninety day period was not received by him until six days later, the request was not timely and, therefore, he lacked jurisdiction to exercise his discretion in the matter.

> "In this instance, therefore, even if the wire be treated as a request for an extension of time it did not reach me until August 19 which was several days after expiration of my authority to grant it. Accordingly even on that basis I must deny it for want of power to grant it."

Petitioner respectfully urges that Sec. 2101(c) does not require that a request for extension be actually received by the individual Justice within ninety days if such request is received at the Court. Indeed Sec. 2101(c) does not even require by its terms that such request be made within the ninety day period. To require petitioner to bear the burden of ascertaining the whereabouts of the individual Justices and then computing the time of mail or telegraph service to Canada or Tibet, is unreasonable. Counsel customarily address all communications to the Court House and receipt there should constitute for the purposes of computing time, receipt by the appropriate Justice. It is possible and very probable that a request for an extension of time addressed to a Justice during the term of Court might not actually be placed within his hands for several days after

its receipt at the Court House in Washington because of illness or absence from the City. Surely, counsel cannot be expected to know and make appropriate time allowances for such personal acts of the various Justices.

In support of his position the Honorable Justice cited Section 415 of Robertson and Kirkham on the "Jurisdiction of the Supreme Court of the United States". This Section of the cited text book states that the law was so laid down in *Cherami vs. Cantrelle*, 287 U. S. 568, 53 S. Ct. 4 (1932). The Cherami case in turn relied upon *Finn vs. Railroad Commission*, 286 U. S. 559, 52 S. Ct. 646 (1932) and *Cresswell v. Tillinghast*, 286 U. S. 560 52 S. Ct. 648 (1932). All of the cited cases were memorandum opinions which merely stated the conclusion that the petition for writ of certiorari was denied inasmuch as the petition had not been filed in accordance with 43 Stat. 940, 28 U. S. C. A. Sec. 350 [substantially re-enacted as 62 Stat. 961, 28 U. S. C. A. Sec. 2101(c)].

It is very significant and of governing importance that the case upon which Section 415 of Robertson and Kirkham relies, *Cherami vs Cantrelle*, supra, was decided in 1932 and therefore prior to the passage of the Federal Rules of Civil Procedure. (As to the cases cited in Cherami, it is impossible to tell if their facts were similar to the facts of the instant case inasmuch as they were merely memorandum opinions.) Even assuming that Cherami states the law as it was at the time of its decision, that law has been changed by the enactment of the Federal Rules of Civil Procedure and by a decision of the Supreme Court applying one of those rules.

This Court now does have the power upon application duly made, even application made beyond the time permitted, to permit now the docketing of this petition. In *Union National Bank of Wichita, Kansas vs. Lamb*, 337 U. S. 38, 69 S. Ct. 911 (1949), a petition for certiorari was filed on the 91st day, the 90th day having fallen on a Sun-

day. The Court held that the petition was timely relying upon Rule 6(a) of the Federal Rules of Civil Procedure. It was held that this rule dealing with computation of time generally and providing that where the last day of a limited period falls upon a Sunday, the act required may be done on the following day, is applicable to 62 Stat. 961, 28 U. S. C. A. Sec. 2101(c). The Court stated:

> "Since the rule had the concurrence of Congress, and since no contrary policy is expressed in the statute governing this review, we think that the *considerations of liberality and leniency* which find expression in Rule 6(a) are equally applicable to 28 U. S. C. A. Sec. 2101(c), 28 U. S. C. A. Sec. 2101(c). The appeal therefore did not fail for lack of timeliness." (Emphasis added)

Accordingly petitioner urges that Rule 6(b), being a part of and, of course in pari materia with Rule 6(a), is a similar rule of "liberality and leniency" which we submit is equally applicable to the interpretation of Sec. 2101(c). Rule 6(b) provides as follows:

> "ENLARGEMENT. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect. * * *"

Therefore, whether the request for leave to docket the petition for certiorari beyond the 90th day be considered

as having been made within the 90 day period or beyond such period, Mr. Justice Burton under Rule 6(b) and the authority of *Union National Bank of Wichita, Kansas vs. Lamb*, 337 U. S. 38, 69 S. Ct. 911 (1949), had the power to grant the extension of time for filing the petition for certiorari as requested in the timely telegram.

Mr. Justice Burton, however, held that he lacked this power. Therefore, he did not exercise his discretion to consider the request for extension of time on the merits. Petitioner respectfully requests that the Court reverse the order of Mr. Justice Burton dated August 22, 1952, and remand the cause for further consideration upon the merits.

It is respectfully urged also that the telegram requesting extension of time was timely having been received at the Court within the ninety-day period. Mr. Justice Burton, therefore, had the power to consider the request for extension on its merits and grant or deny the request within his discretion.

B. Delay in filing was excusable and extension of time should be granted.

In view of the fact that the delay in filing was solely to permit page references for the convenience of the Court to be inserted, the Justice should exercise his discretion to grant an extension of time for applying for a writ of certiorari. Counsel for the petitioner had in their hands within the ninety-day period the final printed petitions for certiorari. Nevertheless, they delayed filing these petitions inasmuch as they were awaiting the return by the Clerk of the Supreme Court of the printed appendices so that they might insert the appropriate page references in their petition. These appendices, of course, are printed by the Clerk and in fact can be printed only by the Clerk of the Supreme Court. In so delaying the filing of the petitions, it appears

that counsel was guilty of an error of judgment or perhaps even of neglect, albeit excusable neglect. Counsel was most reluctant to file petitions which were incomplete by reason of the omission of page references to these appendices. The filing was thus delayed only for the convenience of the Court, not for the convenience of counsel. It is, therefore, urged that in view of these circumstances counsel's error of judgment should not be permitted to prejudice rights of this petitioner.

The petitioner desires to set forth the following additional reasons why Mr. Justice Burton should exercise his discretion at this time to grant leave to docket this petition for certiorari:

1. This case presents important constitutional questions which have already been recognized by this Court as properly the subject of review as indicated by the fact that it has granted certiorari in the case of *Johnson vs. N. Y., N. H. & H. R. Co.*, 194 F. 26, 194 F. 2d 26 (C. A. 2d, 1952), a case which presents practically the same questions as that involved in the instant case.

2. Your petitioner has undergone great financial expense in the preparation of the trial, the presentation of the various appeals, and the completion of the record and petition for certiorari to the Supreme Court.

3. A grave and serious loss would be suffered by the widow and the infant children if she is deprived of her day in Court, when any delay in the filing of the petition was due in no manner to any neglect or carelessness on her part, but at the most, to "excusable neglect" by her counsel.

4. The amount of the delay beyond the ninety-day period in filing this petition, if in fact the petition is *not* timely, is de minimis, being only a matter of hours.

5. No one has been prejudiced by the aforesaid delay.

For all of the foregoing reasons it is respectfully urged that this is an appropriate case for the exercise of discretion to grant an extension of time for applying for writ of certiorari.

C. The petition as filed was timely.

Mr. Justice Burton in his opinion listed what he conceived to be four arguments in support of the Petition For Leave to Docket Petition For Certiorari. These arguments he held can be determined only by the full Court and, therefore, he did not pass upon the merits of the enumerated contentions. Therefore, the petition is still before the Court and this memorandum restates petitioner's position.

The grounds in support of the original petition which were not considered by Mr. Justice Burton were summarized in his opinion as follows:

"1. The petition was *mailed* from Philadelphia on August 13th and therefore should be recognized as timely, although not received by the Clerk until August 14th.

2. The wire of August 13th, which was received by the Guard at the Supreme Court Building at 7:30 P. M. after the Clerk's office was closed, renders the petition to which it relates timely, although the petition itself did not reach either the building or the Clerk until August 14th.

3. Petitioner did not receive actual *notice* of the action of the Court of Appeals until May 16, 1952, although the action was taken by that Court on May 15, and therefore the ninety-day period for filing the petition for certiorari did not expire until August 14 and included that day.

4. Petitioner is entitled to special consideration because her counsel's delay in filing the petition for certiorari was in part due to the fact that he did not receive certain printed appendices from the Clerk of this Court until August 14, and counsel had postponed mailing the petition until August 13 in order to insert certain page references to the appendices."

(This argument for special consideration was discussed above also as a ground for exercising discretion in granting an extension of time.)

III. CONCLUSION.

It is respectfully submitted that Mr. Justice Burton had jurisdiction to consider the request for an extension of time in that said request was duly filed at the United States Supreme Court within the ninety-day period. Under Rule 6(b) which expresses a Congressional policy of "liberality and leniency" the Justice had authority to consider such a request even were it filed after the ninety-day period.

The request should be granted because the delay in filing the petition and brief was the result of "excusable neglect" in that counsel awaited the receipt of the appendices from the Clerk of the Court in order to insert the page references for the convenience of the Justices, and because of the importance of the Constitutional questions raised by the petition for certiorari, the hardship to the petitioner and the lack of detriment to the Court or any parties occasioned by a delay of a few hours. The petition was timely having been placed in the mails within the specified time.

WHEREFORE, petitioner prays for an order that her petition for certiorari be docketed, or in the alternative, that the order of Mr. Justice Burton be set aside and the

cause remanded so that her application for extension of time for applying for writ of certiorari can be considered on the merits.

And she will ever pray.

RICHTER, LORD & FARAGE,
B. NATHANIEL RICHTER,
ALAN KAHN,
Attorneys for Petitioner.

LOIS G. FORER,
Of Counsel.

I hereby certify that the foregoing petition is presented in good faith and not for delay.

B. NATHANIEL RICHTER.

4

SEP 1) 1952

CHARLES ELMORE CROPLE
CLERK

IN THE

Supreme Court of the United States

October Term 1952 No. 271

CHARLOTTE WILD, Administratrix of the Estate of John Wild, Deceased,
Petitioner

vs.

ATLANTIC REFINING COMPANY,
Defendant and Third Party Plaintiff,
Respondent

vs.

CAMDEN PAINTING COMPANY,
Third Party Defendant

Reply to Petition for Re-Hearing by the Full Court on Petition for Extension of Time of Filing Petition for Certiorari and for Leave to Docket Petition for Certiorari

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Reply to Petition for Re-Hearing by the Full Court on Petition for Extension of Time of Filing Petition for Certiorari and for Leave to Docket Petition for Certiorari

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Atlantic Refining Company, by its attorneys, replies to the Petition for Re-hearing filed herein and prays that said petition be denied for the reason that, as a matter of record, the Petition for Certiorari was not filed within 90 days after entry of judgment as required by Section 2101 (c) of Title 28, U.S.C.A., nor was an enlargement of the time for filing said petition granted by a Justice of this Honorable Court prior to the expiration of said time period.

It is respectfully submitted that the Petition for Re-hearing should be denied and the respondent so prays.

Respectfully submitted,

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